Atlantic Queens Bus Corp.; Atlantic Escorts Inc.; Canal Escorts, Inc.; and Amboy Bus Co., Inc. *and* Local 1181-1061, Amalgamated Transit Union, AFL–CIO. Cases 29–CA–100833, 29–CA–100865, 29–CA–100876, 29–CA–100962, 29–CA–101013, 29–CA–101014, 29–CA–101036, and 29–CA–101072

April 21, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

On September 20, 2013, Administrative Law Judge Raymond P. Green issued the attached decision.[1] The Respondents filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondents filed a reply brief.[2] The General Counsel filed cross-exceptions and a supporting brief, the Respondents filed an answering brief, and the General Counsel filed a reply brief. The Charging Party filed limited cross-exceptions and a supporting brief, the Respondents filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[4]

While negotiating a successor collective-bargaining agreement with the Charging Party Union, which has long represented the Respondents' employees, the Respondents declared an overall bargaining impasse and implemented their final offer based on an asserted deadlock over a single issue—the inclusion of a most-favored-nations clause (explained below).

In general, the Board requires the existence of an overall impasse in bargaining before an employer may unilaterally implement some or all of the terms encompassed by its final offer. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (implementation typically prohibited "unless and until an overall impasse has been reached on bargaining for the agreement as a whole"), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). However, our precedent recognizes that overall impasse may be reached based on a deadlock over a single issue. "A single issue . . . may be of such overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues." *CalMat Co.*, 331 NLRB 1084, 1097 (2000). The party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of "overriding importance" in the bargaining; and (3) that the impasse as to the single issue "led to a breakdown in overall negotiations—in short, that there can be no progress *on any aspect of the negotiations* until the impasse relating to the critical issue is resolved." Id. (emphasis added).

The judge concluded that the Respondents violated Section 8(a)(5) based on his finding regarding element 2, i.e., that the most-favored-nations clause issue was not critical. We agree that the Respondents violated Section 8(a)(5), but on a different basis. We do not reach whether the most-favored-nations clause was a critical issue, or

[1] We have amended the case caption to remove Respondents All American School Bus Corp.; ANJ Service, Inc.; Bobby's Bus Co. Inc.; Boro Transit, Inc.; B Alert Inc.; City Wide Transit, Inc.; Cifra Escorts, Inc.; Empire State Escorts, Inc.; Gotham Bus Co. Inc.; Grandpa's Bus Co., Inc.; Hoyt Transportation Corp.; IC Escorts, Inc.; Kings Matron Corp.; Logan Transportation Systems, Inc.; Lonero Transit Inc.; Lorissa Bus Service Inc.; Mountainside Transportation Co., Inc.; Pioneer School Bus Rental, Inc.; Pioneer Transportation Corp.; Rainbow Transit Inc.; Reliant Transportation, Inc.; RPM Systems Inc.; School Days Inc.; and Tufaro Transit Co. Inc. On various dates, the Board granted, through the Office of the Executive Secretary, these Respondents' motions to withdraw their exceptions to the judge's decision and the General Counsel's motions to sever their cases from this proceeding.

[2] Respondent Canal Escorts, Inc. joined only the Respondents' exceptions and supporting brief. It did not join any of the Respondents' subsequent filings.

[3] The Respondents have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently misstated which principals represented certain companies. Joe Curcio did not represent Empire State Escorts, Inc. He represented ANJ Service, Inc., Boro Transit, Inc., and Lonero Transit Inc. Joseph Termini Jr. did not represent Gotham Bus Co. Inc. He represented only Hoyt Transportation Corp. These errors do not affect the disposition of the case.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the modified Order and in accordance with our decisions in *Durham School Services*, 360 NLRB No. 85 (2014), and *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

As Pioneer Transportation Corp. has been severed from the case, the allegation that it violated Sec. 8(a)(1) by threatening employees is not before us. We accordingly omit the separate recommended Order and notice pertaining to Pioneer.

whether the parties were at impasse on that issue. Even if those two elements of the single-issue impasse test were established here, the third requirement was not. The evidence does not support a finding that, at the time the Respondents declared impasse, the parties were unable to make "progress on any aspect of the negotiations" until they resolved any impasse that existed regarding the most-favored-nations clause issue. Accordingly, we affirm the judge's conclusion that the Respondents violated Section 8(a)(5) and (1) of the Act by implementing their final offer.[5]

The Respondents provided schoolbus services for K–12 students under contracts with the New York City Department of Education (DOE). Although they have not formed a multiemployer association, over the past few decades the DOE K–12 schoolbus contractors with employees represented by the Union have typically bargained together and signed identical collective-bargaining agreements. The most recent agreement was effective by its terms from July 1, 2009, to December 31, 2012. That agreement included a most-favored-nations clause, which provided that if the Union entered into a collective-bargaining agreement with an employer also under contract with the DOE to provide K–12 schoolbus services, and that agreement provided terms as to certain issues more favorable to that employer than the Respondents' agreement provided them, the Respondents would have the right to adopt those more favorable terms.[6]

The Union and 28 schoolbus contractors began bargaining for a successor agreement on October 23, 2012. Before bargaining began, the parties were aware that the city of New York intended to make a far-reaching change to its K–12 busing contracts. Since 1979, all DOE schoolbus contracts had included a provision called the Employee Protection Provision (EPP). The EPP required DOE schoolbus contractors to hire drivers and matrons[7] who had been laid off by other DOE contractors and to grant them the same wages and benefits they had received from their previous employer. The EPP ensured that would-be bidders for DOE school-busing contracts could not undercut existing contractors on labor costs: the new contractor would be contractually required to hire its predecessor's employees (or other, more senior out-of-work drivers and matrons) at the same wages and benefits they had previously received. While the EPP was in place, the DOE simply extended its contracts without rebidding them. By May 2012, however, the parties understood that the city intended to depart from this regime and rebid the longstanding busing contracts without the EPP. This profound change dominated, and impeded, the early collective-bargaining negotiations, with the contractors, including the Respondents, expressing fear that they would be unable to compete with the flood of new bidders, and the Union expressing fear for its members' job security, wages, and benefits.

Over the first seven bargaining sessions (October 23, 2012, to February 12, 2013), the parties made limited headway. For example, as to wages, on October 23 the Respondents[8] proposed a 20-percent wage reduction, and by February 12 they were proposing a 15-percent wage reduction. The Union began by proposing a 4-percent wage increase in each year of a proposed 3-year contract, and by February 12 it had moved to 3.75 percent. The parties discussed many other subjects as well, including whether to keep the expired contract's most-favored-nations clause.

Meanwhile, events away from the bargaining table substantially affected the matters under negotiation in collective bargaining. On December 21, the DOE announced its first request for bids without the EPP. On January 16, 2013,[9] the Union began a strike that was targeted at persuading the city to change course and retain the EPP. The city did not change course. On February 12, the DOE opened the first set of bids, and the four contractors in the bargaining group with routes in that set lost essentially all of their bids, which would require them to lay off about 2000 employees.

The strike ended on February 20, and the parties held five more bargaining sessions between February 26 and March 19.

At the March 11 session, the Union said it would never agree to a contract with a most-favored-nations clause, and the Respondents replied that they would never agree to a contract without it. On wages, however, there was movement on both sides of the table. On February 26, the Respondents proposed a 14-percent wage reduction for drivers and matrons alike. At the penultimate session, on March 12, the Respondents reduced their pro-

[5] In its limited cross-exceptions, the Union argues that certain items in the Respondents' final offer could not be lawfully implemented even assuming a valid impasse. That is not the theory of the case before us. The General Counsel alleged *only* that the Respondents unilaterally implemented their final offer without a valid impasse. A charging party cannot enlarge upon or change the General Counsel's theory of the case. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). In any event, the Union's argument is moot in light of our disposition of this case.

[6] The most-favored-nations clause applied to a handful of significant issues, including wages, health insurance coverage, and pensions.

[7] Matrons are bus attendants who help on special education routes.

[8] All of the contractors, including the Respondents, presented unified bargaining positions. For simplicity, we hereafter refer only to the Respondents.

[9] All dates hereafter are in 2013.

posed wage reductions to 10 percent for drivers and 5 percent for matrons. They also continued to offer a small wage increase during the third year of the contract (first offered on March 11). For its part, on March 12 the Union lowered its proposed wage increase from 3.75 to 3 percent for each year of the contract.

During the morning of the March 19 session, the Union proposed a 2-percent wage increase for the first 2 years of the contract and a 3-percent increase for the third, and it told the Respondents that it still had room to move. After a midday caucus, the Respondents distributed a written proposal, entitled "Employers' Best and Final Offer," which included further movement on wages from their March 12 proposal. The Respondents reduced their proposed wage cut to 7.5 percent for drivers and 3.75 percent for matrons, with the same small increase in the last year of the contract. Notwithstanding the ongoing movement on wages, the Respondents declared overall impasse that afternoon, based on the Respondents' contention that a deadlock on the most-favored-nations clause privileged their implementation of their entire final offer.

No party argues that an overall impasse existed on March 19 because the parties were deadlocked on multiple issues. Rather, the Respondents argue they were permitted to implement their final offer because the parties were at impasse over the single issue of the most-favored-nations clause on the afternoon of March 19. As noted above, the Respondents could lawfully implement their final offer based on a single-issue impasse, but only if (i) an impasse existed as to the most-favored-nations issue; (ii) that issue was of "overriding importance" in the negotiations and thus "critical"; and (iii) the impasse regarding that issue left the parties unable to make "progress on *any aspect of the negotiations*." *CalMat Co.*, 331 NLRB at 1097 (emphasis added). We do not reach the first two requirements, nor do we adopt or pass on the judge's analysis of whether the most-favored-nations clause was a "critical" issue. Rather, we find that the record establishes that any deadlock over the most-favored-nations clause did not prevent the parties from making progress on other issues. Id.

The record evidence shows that labor costs were important in the negotiations. After little movement on wages during the first months of negotiations, the parties substantially changed their respective wage-rate demands during the last month of bargaining. Moreover, both parties moved significantly on wages on March 19, the day the Respondents declared impasse. On that date, the Union abandoned its March 12 demand of a 3-percent increase in each year of the contract—itself a downward move from 3.75 percent prior to March 12—to 2 percent for the first 2 years and 3 percent for the last year, and it announced that it still had room to move. Furthermore, the Respondents changed their wage-rate proposals as part of the "Best and Final Offer" presented on March 19, which departed from the Respondents' March 12 wage-reduction proposal of 10 percent for drivers and 5 percent for matrons, which itself represented a substantial change from the Respondents' March 11 proposal of 14-percent reductions for each. In comparison to these earlier proposals, the Respondents' final offer presented on March 19 would have reduced wages 7.5 percent for drivers and 3.75 percent for matrons.

We recognize that the parties had taken opposing and potentially irreconcilable positions regarding the most-favored-nations clause issue. The record demonstrates, however, that these positions—though starkly different—had not frustrated the progress of further negotiations as of March 19. Compare *Sacramento Union*, 291 NLRB 552, 556–557 (1988) (finding that even if there was a deadlock over a single, critical issue, there was no overall breakdown in negotiations where the parties had reached "agreement on many issues as a result of concessions by both sides" the day before the employer declared impasse),[10] with *Richmond Electrical Services,* 348 NLRB 1001, 1002–1003 (2006) (finding single-issue impasse where deadlock on wage rates prevented progress on anything beyond limited matters). Regardless of whatever importance the parties may have attached to the most-favored-nations clause issue, and even if the parties were at an impasse regarding that issue on or before March 19, the record does not permit a finding that, as of the afternoon of March 19, the parties were unable to make further "progress on any aspect of the negotiations." *CalMat Co.*, 331 NLRB at 1097. Accordingly, we find that the Respondents violated Section 8(a)(5) and (1) of the Act by declaring impasse and implementing the terms of their final offer.

ORDER

The National Labor Relations Board orders that the Respondents, Atlantic Queens Bus Corp., Staten Island, New York, Atlantic Escorts Inc., Staten Island, New York, Canal Escorts, Inc., Brooklyn, New York, and Amboy Bus Co., Inc., Staten Island, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union by prematurely declaring impasse in collective-bargaining negotiations.

[10] Enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989).

(b) Unilaterally changing the terms and conditions of employment of their unit employees by implementing their last offer without the parties' having reached a lawful impasse.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time drivers, shop employees and matron-attendant escorts but excluding all guards and supervisors as defined in section 2(11) of the Act.

(b) Rescind the changes in the terms and conditions of employment for their unit employees that were unilaterally implemented after the declaration of impasse on March 19, 2013.

(c) Make their unit employees whole for any loss of earnings and other benefits suffered as a result of their unlawful changes in the manner set forth in the remedy section of the judge's decision.

(d) Compensate their unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at their Brooklyn and Staten Island, New York facilities copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any of the Respondents have gone out of business or closed its facility involved in these proceedings, such Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. April 21, 2015

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Philip A. Miscimarra, Member

_____
Kent Y. Hirozawa, Member

_____
Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Local 1181–1061, Amalgamated Transit Union, AFL–CIO (the Union) by prematurely declaring impasse in collective-bargaining negotiations.

WE WILL NOT unilaterally change your terms and conditions of employment by implementing our last offer without reaching a lawful impasse with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time drivers, shop employees and matron-attendant escorts but excluding all guards and supervisors as defined in section 2(11) of the Act.

WE WILL rescind the changes in the terms and conditions of employment of our unit employees that we unilaterally implemented after declaring impasse on March 19, 2013.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful changes, plus interest.

WE WILL compensate our unit employees for any adverse tax consequences of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

ATLANTIC QUEENS BUS CORP.; ATLANTIC ESCORTS INC.; CANAL ESCORTS, INC.; AND AMBOY BUS CO., INC.

The Board's decision can be found at http://www.nlrb.gov/case/29-CA-100833 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Annie Hsu, Esq. and *Erin Schaefer, Esq.,* for the General Counsel.

Jeffrey D. Pollack, Esq., Richard L. Milman, Esq., Michael J. Mauro, Esq., and *Peter N. Kirsanow Esq.,* for the Respondents.

Richard Brook, Esq., Richard N. Gilberg, Esq., and *Jessica Drangle Ochs, Esq.,* for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in New York City from July 22 to 31, 2013. The complaint in these cases was issued on June 10, 2013. This was based on a series of charges which were consolidated because the named companies jointly bargained with the Union.[1] In substance the complaint alleged:

1. That the Union has been recognized as the exclusive bargaining agent for the full-time and regular part-time drivers, shop employees and matron-attendants of each of the employers named in the caption and that the most recent collective-bargaining agreements ran from July 1, 2009, to December 31, 2012.[2]

2. That on or about March 20, 2013, Respondent Pioneer, in writing, threatened its employees with disciplinary action and discharge if they engaged in union activities.

3. That on or about March 19, 2013, the Respondents presented to the Union its final proposal and declared an impasse in bargaining.

4. That on or about March 22, 2013, the Respondents implemented the terms of the final offer and thereby unilaterally changed their employees' terms and conditions of employment.

5. That the impasse declared by the Respondents was premature and therefore cannot be the basis of its subsequent refusal to bargain and the implementation of the final offer.

The Respondents contend that they insisted as a condition of reaching an agreement that the Union agree to continue a "most favored nations" clause into a new collective-bargaining agreement. It is their position that the retention of this contract provision was so essential to their continued economic viability that when the parties reached impasse on this item, no further

[1] On June 25, 2013, the Regional Director approved the withdrawal of the charges filed against R&C Transportation Corp., Case 29–CA–100963, and B&M Escorts, Inc., Cases 29–CA–100858 and 29–CA–100858.

[2] There is no allegation that there is a single bargaining unit as a result of associationwide bargaining.

bargaining was possible and that an overall impasse was reached. They therefore contend that they were justified in implementing the final offer that was made on March 19, 2013. Additionally, the Respondents contend that the Union was engaged in stalling tactics.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondents are employers engaged in commerce within the meaning of Section 2(1), (6), and (7) of the National Labor Relations Act (the Act). It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background

At the outset I wish to note that there were multiple people who attended all or some of the bargaining sessions and who took notes. From my observation, it seemed obvious that although some of the participants could recollect, on their own, some specific statements, the bulk of the testimony insofar as it related to discussions at the bargaining table, was based on witnesses who either used their notes to refresh their recollections or just plain used their notes because they had no detailed recollection. I am therefore going to rely very heavily on the actual notes taken by the participants, which by the way, are not so far divergent from each other.

There also was testimony given by the respective sides regarding conversations that took place away from the bargaining table and which were not memorialized by written documents. While the Respondents seem to imply that any such side bar conversations should be construed as irrelevant, I don't agree. To the extent that conversations took place between agents of the Union and principals or agents of certain of the Respondents, these are, in my opinion, relevant as they tend to illuminate the actual positions and the motivations for each side's respective positions. To some extent, testimony regarding these conversations will require credibility findings.

The Respondents consist of 28 companies that provide general and special education schoolbus service for the Department of Education of the city of New York (DOE). These services are provided for kindergarten to grade 12 students. (Bus services for preschool children are not included.) In some instances, a particular respondent has provided both driver and matron services. In other instances, a particular respondent has provided either only driver or matron services. At the time that these negotiations commenced in 2012, the Respondents collectively employed about 8800 employees that were represented by Local 1181.[3] This represents approximately 75 percent of the drivers and escorts performing this type of work on New York City schoolbus routes.[4]

The companies that have provided these services under contract with the DOE have enjoyed a protected competitive status since about 1979. That is, they have operated essentially without competition from other contractors (and their employees), because since 1979, all or almost all of the DOE contracts that these selected companies have had, were extended and not put out for bid. Also, as a result of a strike settlement that was negotiated back in 1979, the city, the Union, and the companies agreed to something called the Employee Protection Provision.[5] This was an agreement that was not contained in the collective-bargaining agreements but was made part of all contracts that existed between the DOE and any company providing kindergarten through grade 12 schoolbus services. In essence, this set up a master seniority list for all of the existing contractors and if for example, one of the companies went out of business and laid off employees, those employees would have to be hired by the other companies that had contracts with the DOE and therefore were signatories to this provision. In that scenario, the employer who took over the routes would not only have to hire the displaced employees based on master list seniority, but would also have to pay any employees hired off the list, their last pay rates and give them their same benefits. This would be the case even if the employee who was laid off was represented by a different union. If that person, for example came from union A and decided to become employed at a company having a contract with union B, then the new employer would have to make contributions to the union funds required by union A's contract with the old employer.[6] Also, there was industrywide seniority for pay and other purposes but not for the picking of routes at the new employer.

As can be seen, there were two interrelated factors that effectively prevented outside contractors and their employees from competing for New York City schoolbus work. The first and most obvious was that with minor exception, the contracts were extended and simply not put out to bid.[7] But even if a group of routes were put out to bid, the winning contractor would have to hire any employees displaced when an existing contractor lost the bid (thereby requiring a layoff), and also would have been required to pay those employees at their previous wage rates and benefits. Under these conditions, there was not much incentive for outside contractors to bid for this work since their

[3] Local 1181 has about 16,000 members.

[4] Local 1181 also represents a number of school bus drivers and escorts who drive preschool children. The employers of those employees are not the same as the contractors who are the Respondents in this case and the collective-bargaining agreements that Local 1181 has with preschool contractors are different from the contracts that it has with the Respondents.

[5] Judge Mollen assisted in the 1979 negotiations and the Employee Protection Provision is sometimes referred to as the "Mollen agreement." Almost always it is referred to as the EPP for short.

[6] In addition, because the EPP basically guaranteed that any new company that obtained DOE work would have to hire its employees from the master list of laid-off employees and make contributions to the existing pension fund that covered those employees, the EPP was the basis for an exemption being granted by the Pension Benefit Guaranty Corp. for withdrawal liability in the event that a Local 1181 contractor ceased operations.

[7] In some instances, the contractors bought and sold contracted routes to each other. These transactions were done subject to the approval of the Department of Education.

labor costs would have to match labor costs of any existing contractors who lost their routes through the bidding process.[8]

All of the contractors in the present case have had a multi-year collective-bargaining history with Local 1181. But not all of the contractors who have had DOE contracts have had contracts with Local 1181. Some have collective-bargaining agreements with Local 854 IBT, some with Local 355 IUJAT, some with Local 445 IAJAT, and some with Local 91 United Crafts Union. Nevertheless, the contractors having agreements with Local 1181 represent the bulk of the schoolbus business. And although the collective-bargaining agreements between Local 1181 and the Respondents were described as being the "Cadillac" contracts, I don't have any information regarding the relative labor costs between the various labor agreements.[9]

The most recent contracts between Local 1181 and the Respondents ran from May 2009 to December 31, 2012. The standard contract agreed to by all of the Respondents, contained a most favored nation's clause at section 51 that read:

> If the Union enters into a collective bargaining agreement with a DOE or NYC Board of Education school bus contractor that provides economic terms regarding wages, health insurance coverage, pension, wage accruals, or the 10 hour daily spread more favorable than contained herein, the Employer shall have the right to unilaterally adopt such provisions. To ensure compliance herewith, the Union agrees to immediately provide the Employer . . . the relevant provisions of any and all other agreements to which it is, or becomes a party covering employees engaged in the transportation of general or special education students pursuant to contracts with the DOE. This provision does not apply to collective bargaining agreements or other contracts that provide solely for service in the pre-k industry. This section will sunset on December 31, 2012, but any terms that the Employer was privileged to adopt pursuant to this section shall remain in effect for as long as such provisions remain in effect for said other employers.[10]

The collective-bargaining agreements also contained a provision at section 48 that reads:

> An integral part of this Agreement is the job security of the employees and the withdrawal liability exemption for the Employers which exists by reason of the Employee Protection Provisions (Mollen Agreement) of the bid specifications of the DOE. The parties agree that in view of the forgoing, should the DOE promulgate any bid specifications without the EPP then the Union, upon notice to the Employer shall have the right to reopen this Agreement; and the provision of Section 3 (No Strike clause) shall be deemed waived for the above mentioned re-opener.

At some point in 2012, the Board of Education announced that it was going to bid out the K–12 schoolbus work and that such bids were not going to contain the Employee Protection Provision (the EPP).

On May 14, 2012, Richard Milman as counsel for some of the Respondents, wrote to the Union's International and stated that the Local 1182 NYC bus contractors could not compete against nonlocal school bus contractors. This letter stated inter alia:

> Although Local 1181 has been the dominant union . . . in the NYC school bus industry for the past 40 years, it has been steadily losing market share to smaller independent unions who negotiated minimal economic terms within its CBAs to non ATU shops. For reasons that are beyond our understanding and comprehension, these independent unions have been able to increase their memberships and renew their CBAs with compensation and fringe benefits that are severely lower than the wages and benefits our clients pay to their ATU drivers and matrons for the same exact work. Our client's competitors who have CBAs with the bargain rate independent unions, and pay their drivers and matrons substandard economic terms have been gaining market share at the expense of our clients and your ATU members.
>
> Starting in 2013 one third of the current 7000 plus DOE school bus routes will come out for bid and our clients will be unable to complete. The contractors with the lower priced independent unions will underbid the 1181 contractors, displaying your ATU membership and putting our clients out of business. The second third of the school bus routes come out for bid in 2014 and the remaining one third come for bid in 2015.
>
> Our clients cannot and will not wait to be priced out of the market by lower competitive bidding ultimately forcing them out of business. Accordingly on behalf of our clients, this Firm and the Firm of Mintz & Gold, LLP will immediately submit our client's initial collective bargaining proposals which will include but not be limited to an approximate 20% reduction in wages and other significant and substantial relief across the board in fringe benefits in order to have an equal playing field to that of our client's competitors and preserve our client's survival in the NYS School bus transportation industry.
>
> The Employment Protection Provisions in the current DOE transportation contracts have protected the ATU members for the past 30 years. That will no longer be the case starting next year. The DOE has made clear its intention to seek competitive bidding starting in 2013 without the EPP which have been a staple in all of the school bus contracts since the last major round of bidding in 1979. (The EPP requires any contractor obtaining work in the future, whether by bid or other-

[8] I think it is fair to say that bids are based on an estimate of the contractor's projected costs over the term of a DOE contract. And in this regard, the major cost considerations are the price of fuel, the cost of vehicles, the costs of land to house the vehicles, and the cost of labor.

[9] I may be wrong, but I would assume that in the absence of outside competition, the collective-bargaining agreements have been substantially similar in terms of wages and benefits.

[10] There was some testimony that this provision was agreed to by the Union at the final session of the 2009 negotiations. I refused to hear testimony about that set of negotiations because the clause was in the contract and it was enough to listen to this set of negotiations. All of the parties agreed that a most favored nation's clause is a mandatory subject of bargaining and therefore the employer can legally insist, as a condition of agreement, on the inclusion of such a clause in a collective-bargaining agreement. (And a union can insist that a contract not contain such a provision.)

> wise to hire its labor for the work from an industry wide master seniority list of displaced labor and to continue to pay the same wages and pension benefits to the labor.)
>
> If there is any question as to the DOE's intentions to bring down labor costs and to seek competitive bidding without the EPP provision in it, consider the following: When the DOE solicited bids in 2010 for its Pre-k work, (as distinguished from our clients General Ed and Special Education contracts) it included an EPP provision as part of its bid specifications. At the same time, it sponsored legislation in Albany which would have permitted it to include the EPP in a request for proposals for the Pre-k work. However, in June 2011, the NY State Court of Appeals . . . found the EPP provisions to be a violation of the NY competitive bidding laws, citing its displeasure with the existing EPP in our industry. Following that decision, the DOE solicited new Pre-k bids without the EPP . . . and dropped its sponsorship of the EPP legislation in Albany. The Court of Appeals decision may well be the death knell of the EPP unless the city decides to sponsor legislation that would permit the EPP in new transportation contracts (an unlikely scenario based upon the city's current position).
>
> So here we are. Local 1181, having fallen into a state of complacency over the past 30 years has sat by while small independent bargain rate unions have taken a larger market share at substantially lower rates of compensation and benefits, leaving our clients at an untenable disadvantage on future bids for contractual work that they currently perform. Without a substantial reduction in wages and fringe benefits our clients are in jeopardy of being forced out of business and the drivers and matrons who are members of Local 1181 ATU will either be out of a job or will be working for another company with independent unions or no unions with substantially lower rates of pay and benefits.

I note that although this letter clearly represented the position of the Respondents contractors, it makes no reference to a most favored nation's clause. Instead, the thrust of the letter is to point out the difference in labor costs between the Respondents having contracts with Local 1181 and schoolbus companies having contracts with other unions (or no unions), and who are anticipated will be competitors when the DOE solicits bids for the work that the Respondents have done in the past without outside competition.

On May 17, 2012, the Union distributed a flyer to its members describing the history of the EPP and why it was so important. This states inter alia:

> In 1979 an agreement was reached with the New York City Board of Education and Local 1181 in Judge Mollen's Chambers which settled a 14 week strike. . . .
>
> The Mollen Agreement protects your tenure, rates of pay, pension and welfare benefits. This agreement is also referred to as "Employee protection provisions. . . . It covers union and non-union employees.
>
> The most important factor of the Mollen Agreement is when an employee loses his/her job which is picked up by another company, the new company must hire and place those employees covered by the agreement, behind his present employees on their seniority list.
>
> In case of a layoff, New York City Board of Education drivers and escorts hold their tenure, pension credit and welfare benefits intact when they are placed with a new employer.
>
> The Mollen Agreement has kept the New York School bus industry at the highest quality of work ethics and safety for the children in the City of New York and has kept labor peace for over 30 years.
>
> In 1995 Mayor Giuliani attempted to take away our Mollen agreement and bid out all of our work without it. At that time, under threat of a city wide strike, we were able to negotiate an extension of the Mollen Agreement.
>
> Now in 2012, unfortunately our current mayor and the City are once again planning to bid out our work without our EPP . . . . We must always be prepared to do whatever we have to, including a strike if necessary, to preserve our job protection, our Mollen Agreement, our EPP.

From May to September 2012, there was no move by either side to start negotiations. Thereafter in September 2012, the Union sent a letter to the Respondents indicating its intention to negotiate for a new contract.

B. The Negotiations

The first bargaining session took place on October 23, 2012, at which time the Employers and the Union exchanged contract proposals. The Union's chief negotiator was Michael Cordiello and the Respondents' chief negotiator was Jeff Pollack. In addition, the Union's legal counsel, Richard Gilberg, attended most of the meetings and in addition to Pollack, several of the company owners or managers attended and sometimes contributed to the conversations. At this initial meeting, the Employer proposal was for a 4-year contract with a 20-percent cut in wages and a wage freeze for the remainder of the contract. It also demanded various other givebacks on welfare, wage adjustments and accruals, overtime, holiday eligibility, etc. Paragraph 8 of the company proposal was that the most favored nation's clause be continued for the duration of any new contract and that the sunset provision contained in the expired contract be deleted. The Union, for its part, asked for wage increases of 4 percent for each of a 3-year contract plus increases in pension and welfare contributions. The Union also proposed that the Mollen agreement be put into the next collective-bargaining agreement. It further proposed a successorship clause so that a seller would be liable for the performance of the agreement until the purchaser or transferee agreed to be bound by the terms of the collective-bargaining agreement.[11]

The next bargaining session took place on November 20, 2012. Pollack, on behalf of the Employers stated that they needed concessions; that they needed to redefine the playing field and that costs were too high and revenues too low. At this

[11] Some of these individuals are also connected to multiple related enterprises. For example, Ray Fouche is connected to All American School Bus Corp., Cifra Escorts, Inc., City Wide Transit, Inc., and Rainbow Transit Inc.

meeting Cordiello proposed extending the contract for 1 year so that that the parties could see what the city does. According to Cordiello, in conjunction with his suggestion that the contract be extended for a year, he also explicitly offered to continue the most favored nation's clause for 1 year. Adem Adem (from Reliant) responded that he "can't even live with it for one year." Adem and Dominick Gatto, from another of the large companies, stated that the Union could look at their financial records.[12]

According to Cordiello, after this first meeting, he had private conversations with a number of the contractors who told him, away from the bargaining table, that the most favored nation's clause was not a deal breaker; that it was a bargaining chip or that it was not that important to them. He testified that among those people who told him this were Carter Pate and Adem Adem from Reliant Transportation; Joe Curcio from Empire State Escorts; Ray Fouche from All American School Bus; Joseph Termini Jr., from Gotham Bus; Agostina Vona from Kings Matron Service; Michael Tornabe from Lorissa Bus Service; and Joe Sabatelli. Additionally, Union Delegate James Hedge testified that he had multiple conversations with Termini of Hoyt Transportation who said that the most favored nation's clause was of no concern to him.

The third meeting was held on December 11, 2012. At this meeting, Pollack presented the Employers' amended demands. Among the highlights, these included a 16-percent reduction in wages, with a wage freeze for the contact's duration; a moratorium for wage accruals and adjustment weeks for the duration of the contract; and a schedule whereby it would take new hires 10 years to reach top pay. These proposals did not include a specific reference to a most favored nation's clause, although the document stated that all previous demands were still in place.

According to Pollack's notes, the Employers asserted that their total yearly cost for a driver was $81,126 and that the total yearly revenue per driver was $108,000, leaving $26,000 to pay for everything else. His notes indicate that there was discussion of various noneconomic issues such as uniforms; checkoff for union dues and initiation fees; and direct deposit of pay checks. Pollack's notes indicate that Cordiello said; "[N]o give backs." I note that Pollack's notes do not indicate that there was any discussion, at this meeting, of the most favored nation's clause.

In the meantime, it seems that the Union engaged in a lobbying effort to change the mayor's mind about putting these routes out for bid. But this was to no avail and on December 21, 2013, requests for bids were sent out without the EPP. This encompassed 1014 special education schoolbus routes where the existing contracts covering these routes were set to expire in June 2013. This meant that approximately 4 of the 28 Respondents were directly affected by this as they held the expiring contracts which required the use of over 2000 of their employees. They were affected because their contracts were being put out for bid and they were being forced to compete against outside contractors who, for the first time in over 40 years, were being given an opportunity to enter this market. On the other hand, those Respondents who had contacts covering general education routes were not affected and neither were those whose contracts were not set to expire until June 2014 or June 2015. However, they obviously would be affected in the future, if the city Government decided, as it apparently intended, to extend this new policy to all contracts when they expired.

On January 8, 2013, a fourth bargaining session was held. According to Pollack, he expressed the opinion that the employers need a fair collective-bargaining agreement in order to compete. The Union submitted revised proposals which included a demand for a 3-year contract with wage increases of $3.75 per hour in the first year and $4 per hour in each of the other 2 years. The bargaining notes indicate that there was discussion on a number of employer proposals, some of which the Union rejected and some of which the Union tabled. According to Pollack's notes, Cordiello specifically rejected the most favored nation's clause. But neither his testimony nor his notes show that there was any further discussion, at this meeting, of this clause or any explanation as to why the employers felt that it was necessary. There also were statements by the Union that they might strike, to which the Employers responded that if the Union struck any of the employers, the others would engage in a lockout.

On January 14, 2013, Cordiello and Gilberg gave a press conference stating the reasons that the Union was going to go out on strike. Basically, they blamed the Mayor for bidding out routes without the EPP and stating that the EPP functions to provide experienced and capable drivers and matrons. A transcript of this press conference states inter alia:

> We understand that costs need to cut and our city is not immune to the tough economic times . . . but 1181 has been a responsible steward for our city. 1181's starting rates for drivers are about $14/hr. Matrons start at $11/hr. The average salary between the matron and driver across the board is about $35,000 to $38,000 year. . . . We have a private system that costs no burden to the taxpayers of New York. Mayor Bloomberg is making a . . . disingenuous argument. . . . The basic argument is that EPP is illegal and this is not true. The EPP was based on a Court of Appeals decision that focused on an industry that's not ours; the pre-k industry—the EPP has been included in K-12 special education and general education contracts for over 47 years and we know that it is not illegal to put it in the bids. . . .
>
> We will continue to push for a resolution but we cannot negotiate from a position that is based on inaccurate information. [The] Mayor also said today . . . that they have been negotiating with us. I met with the Chancellor for 20 minutes last week and with the Deputy Chancellor . . . but they never offered any solutions. Therefore, while we remain optimistic that we can reach an agreement, we are here today to an-

[12] The Respondents made much of the fact that some of the companies offered to have their financial records reviewed by the Union. But there was a significant delay between the initial offers and the actual reviews inasmuch as those few companies that did agree to have audits, did so after conditioning them on the execution of confidentiality agreements. There is nothing wrong with such a condition, but the separate negotiations to achieve that result took up a good deal of time and only a few reviews were actually accomplished by early March 2013. As noted hereinafter, the Respondents declared impasse on March 19, 2013.

> nounce that Local 1181 will strike effective Wednesday morning. . . .
>
> We represent . . . 8,800 members. Sixty percent of them are drivers, 40% of them are matrons. I can only speak for my Local, but our contract has expired and because of the EPP's removal, our contract negotiations have become impossible because not knowing whether the EPP will be provided or not. . . .
>
> The Mayor can end the strike.
>
> REPORTER: Why is the strike solely City Hall's responsibility at this point?
>
> CORDIELLO: Because they're the ones who removed the EPP . . . the EPPs have been in those contracts . . . since about 1965. In 1979 they were removed and that's what caused the last strike. And to resolve the strike . . . Judge Mollen came and put the EPP back in.

On January 16, 2013, Local 1181's members went out on strike basically to protest the mayor's refusal to change his mind about letting out schoolbus routes for bid without the EPP. However, the employees of the other companies having DOE contracts and having contracts with unions other than Local 1181 did not engage in the strike and continued to work.

The mayor did not change his mind.

On January 22, 2013, the fifth bargaining session took place. Cordiello asked that the EPP be put into the next collective-bargaining agreement and this was rejected by the Employers. Pollack stated that the Union would have to take some cuts in order to allow the Employers to keep their work and that with or without the EPP, they still needed concessions. Pollack asked if the Union had a plan B in the event that the mayor didn't change his mind and the Union was told that the employers would replace the strikers if they had to. There was no discussion of the most favored nation's clause at this meeting.

Pursuant to a request by the mayor's office, representatives of the Respondents and the Union met at Gracie Mansion on January 28. (A representative of the International Union was also present.) Judge Mollen attended, although neither the mayor nor any representative of the mayor showed up. At this meeting, Gatto said that in 1979 his prices were $235 per day whereas they currently were about $600 per day. One of the Employers stated that labor represented about 75 percent of his costs; that this was not sustainable and that his company, Reliant, would open its books to the Union. He also said that he would be better off liquidating his business in New York and moving out. The Union was asked to call off the strike for 2 weeks and Cordiello responded that he could not do that unless the bids were suspended. There was no discussion of the most favored nation's clause at this meeting. Not surprisingly, nothing was accomplished since the 800-pound gorilla was missing from the room.

The next bargaining session took place on February 5, 2013. Pollack submitted a revised employer proposal that among other things demanded a 16-percent reduction in wages and a freeze on wages for the remainder of the contract. He also handed out a cost sheet purporting to show the average cost of a driver under the old contract. The Union responded by reducing its wage demand by asking for increases of $3.75 for each year of a 3-year contract. Cordiello also stated that the Union would have to study the cost sheet while asserting that some of the costs were not attributable to the labor agreement. Pollack's notes indicate that he stated that it was time to negotiate "in the new world order" and that Cordiello responded that the Union hadn't given up on plan A; that the city council was holding a hearing on the EPP. Some of the owners stated that Local 1181's contract costs were higher than those of the other unions and that Long Island contracts were much cheaper. Cordiello stated that if the EPP was preserved there would be no need for give backs and that before the Union would agree to reductions it would have to look at the financial records. There is nothing in any of the bargaining notes to indicate that the most favored nation's clause was discussed during this meeting.

On February 12, the parties had another meeting where the Union made a proposal regarding paid holidays. Pollack said that the employers needed real savings and proposed a 15-percent cut in wages. The Union was asked if it would be sufficient if they had an opportunity to review the records of several of the companies and Gatto, along with representatives of three other companies, offered to show their books. The Union accepted the offer and stated that it would work with its outside accountants to conduct the audits. The evidence shows that there was some discussion of certain economic issues such as overtime, but that there was no discussion of the most favored nation's clause.

But the really important thing that happened at the February 12 meeting was that the DOE opened the bids and announced the results. The participants at the bargaining session were being told the results as the announcements were being made and they soon realized that those of the Respondents who had special education DOE contracts expiring in June 2013 had made bids which were too high to enable them retain over 1000 routes. This meant that if the other bids were accepted by the Department of Education as being made by contractors deemed able to perform the work, some of the Respondents would lose over 1000 routes and would have to lay off over 2000 drivers and matrons at the end of the school year in June.

In the meantime, the Union was lobbying to retain the EPP and on February 14, 2013, it obtained from certain of the Democratic mayoral candidates, a statement that they would, if elected, reconsider the EPP. (Meaning requiring bidders to agree to the Employee Protection Provision as a term of any DOE contract.) This letter stated:

> We pledge, if elected to revisit the school bus transportation system and contracts and take effective actions to insure that the important job security, wages and benefits of your members are protected within the bidding process, while at the same time are fiscally responsible for taxpayers.

On February 15, the Union announced that it was ending the strike and on February 20 its members returned to work.

On February 20, Local 1181 entered into a separate strike settlement agreement with Reliant which is one of the Respondents with the largest number of routes and which, unlike many of the other Respondents, is not a family based enter-

prise. Instead, it is a part of a huge corporation that is based in Dallas and which provides a wide variety of transportation services nationally and internationally.[13] This agreement with Reliant included a very limited type of most favored nation's clause wherein the Union agreed that if it entered into a collective-bargaining agreement with the other Respondents covering general or special education work that provided for more favorable terms pertaining to a moratorium on welfare plan contributions and/or pro rata relief on welfare and pension plan contributions relating to the strike, then those provisions would also be given to Reliant. Additionally, Reliant agreed that if asked, it would separately meet with the Union at least once a week. (It was never asked.)

On or about February 23, Pollack sent to the Union a written set of amended proposals. From the previous demand for a 15-percent reduction in pay, the amended proposal called for a 14-percent reduction and then a wage freeze for 3 years. It also proposed that in the fourth year, a wage increase would be given equal to a third of the CPI. (Consumer price index.) Other items proposed were a moratorium on welfare contributions, a freeze on pension contributions, and the elimination of the Easter adjustment and the wage accruals for the term of the contract. Finally, the proposal explicitly called for the retention of the most favored nation's clause and the elimination of the sunset provision in that clause.

As this will come up later, a brief description of the Easter adjustment and the wage accruals is in order. Under the expired contract, there is a separate wage provision that provides that covered employees get a week's pay during the Easter holiday. There also is a provision that covered employees are entitled to several weeks of accrued pay that is distributed for the summer vacation when most employees are not working. For some of the companies involved in this case, these payments would amount to hundreds of thousands of dollars. Further, under the law, these payments would be due in 2013, to the covered employees despite the fact that the collective-bargaining agreement had expired on December 31, 2012. The law relating to this is that an employer having a bargaining relationship with a union cannot unilaterally change the existing conditions of employment (including wages and benefits), even though they are embodied in an expired contract, unless (a) the parties come to a new agreement to make such changes; or (b) the parties reach a valid impasse in bargaining; or (c) the employer is legally discharged from bargaining with the Union. *NLRB v. Katz*, 369 U.S. 736 (1961); *E. I. du Pont & Co*., 346 NLRB 553 (2004); *Gloversville Embossing Corp.*, 314 NLRB 1258 (1994). Because an incumbent union normally enjoys a presumption of continuing majority status, the last situation (c) can only occur if there is an election that the incumbent union loses or if an employer withdraws recognition based on objective evidence that the union has lost its majority status.[14]

The next meeting was held on February 26. At this meeting, the Union made a formal response to the Employers' amended proposals. Cordiello stated that the Union could not go to its members and ask for give backs without seeing financial records. (At this point, the Union first received proposed confidentiality agreements.) In response to Pollack's statement that the Employers needed the most favored nation's clause, Cordiello stated that he could not agree to it; that he could never agree to it; and that the Union would have to close its doors if it agreed to it. Although there was some give and take on the most favored nation's clause, the evidence does not show that either side, at this meeting, expressed why this was so important to them. Gilberg testified that at this meeting, Gatto said that he was going to go until March 5 and then that was it; "just watch." In this respect, Gilberg's testimony was essentially corroborated by Edward Giggliotti, the Union's vice president.

Sometime in early March 2013, the Union distributed a flyer to its members describing where matters stood in the negotiations. This stated:

> The Department of Education took bids on 1100 special education routes and opened them on February 12. . . . The new bids featured low bids including matrons at $450 per day; featured high bids at $1500 per day. These bids will be awarded to the lowest responsible bidder according to the bid specs. Local 1181 companies under the current $800 per day per vehicle average may not be successful bidders in any upcoming bids.
>
> This bid was issued without EPPs. Several of the companies we are currently in negotiations with have told us they are losing money or had their profits greatly reduced. As a result, we have asked those companies to submit to an audit which will be performed by union auditors to verify the companies' claims. Some of the companies have filed a lawsuit against the Department of Education.

March 5, 2013, was the date of the next meeting. According to Cordiello, before the meeting started Gatto told him that the employers could not afford and were not going to pay the Easter adjustments; that they were going to present their final offer before those payments were due.

Regarding the meeting itself, Pollack notified the Union that between one and three employers would be willing to open their books. Cordiello responded that the Union would give a response to the overtime issue when it had a chance to do the audits. The evidence is that for the remainder of the meeting, the following statements were made. Pollack stated that the employers were willing to meet all day and night at the next scheduled meetings and Cordiello rejected this idea. The Union asked for a 2-year contract term. Pollack stated that the employers must have wage concessions regardless of what the

[13] Reliant, a subsidiary of MV Industries, is a fairly recent entrant into this market having bought the assets of United, a company that had a contract with Local 1181 and which had gone out of business. The testimony was that Reliant decided to enter the schoolbus market in New York City because of the fact that there was no competition from contractors that did not already perform this work. As such, it was willing to assume the contract with Local 1181 because of the belief that there was a wide moat protecting the business from outside competition. I also note that Reliant, because of its size, was probably able to obtain lower fuel prices through the use of pooling arrangements.

[14] There is also the possibility of bankruptcy, where in certain limited circumstances, a bankruptcy judge may alter or modify an existing collective-bargaining agreement.

audits showed and Cordiello responded that he needed to see the audits first. Neil Strahl of Pioneer stated that withdrawal liability was also an issue for Employers. There is no indication that the most favored nation's clause was discussed at this meeting.

At a somewhat later date in March, the Union distributed another flyer to its members that stated inter alia:

> The companies claim they are losing money so we have asked the companies to open their books to have our Auditors look at all of the company's finances and some companies have agreed. As a result the auditors have found that at this time companies who employ a substantial number of our members appear to be losing money.
>
> In these negotiations the companies' position has been that they will not be able to bid appropriately in the upcoming bids because of two factors.
>
> 1. With the EPP in the bids there are union and nonunion companies that have lesser contracts than Local 1181 contracts (which is the leading contract in the industry) and the companies claim that they must be able to reduce the cost of operating in order to bid properly to win work in the next bid. Naturally if the existing companies you work for win work in a bid, your jobs, medical benefits and pensions will be preserved.
>
> 2. If the EPP is out of the bids (as in the current bid), new contractors could come in with no bottom floor on wages, such as the bidder who bid $450 a day per bus. If you do the math, [Local] 1181 drivers are paid $200 per day and matrons $120 per day. That's already $320 when you add in the cost of our benefits, pensions, fuel, insurance, bus payments, rent etc. . . . The companies claim they would not be able to compete with that.
>
> The companies' position is also to obtain major givebacks from their employees.
>
> It is the Union's position that we continue to secure the most lucrative contract for our members but keeping in mind that first and foremost we need to be able to protect our jobs, wages, medical benefits, pensions etc.
>
> These are trying times . . . and Mayor Bloomberg is leaving this City in shambles, destroying the education system and the middle class. . . .
>
> A lawsuit has been filed by 3 companies against the DOE which claims that the EPP should be removed from all the current contracts. . . . The union has moved to intervene . . . and will oppose the companies' claims.
>
> The union will continue to work with politicians and parents' groups to insure that when this mayor is gone we will be able to reestablish the EPP in all bids and existing contracts.
>
> Also, we have been sending . . . Jimmy Hedge . . . to Albany so that he can meet with and give Local 1181's position to our State Senators and the State Assemblyman. The goal is to gain State support. I will also continue to work with the New York State AFL–CIO. . . .
>
> We will continue our fight for our job protections. The strike was not in vain but it was a necessary tool to raise awareness to our issue. On the following page is the letter of commitment signed by the Democratic candidates of Mayor to help us restore the EPP. . . .

I note that in neither of these flyers, did the Union mention that the companies were demanding a most favored nations clause or that this was, in the Union's opinion, a significant issue. This is, in fact, consistent with the Union's belief that based on statements made to them by various employers the most favored nation's issue was simply a ploy or being used as a bargaining chip.

The next meeting was held on March 11. The employers tendered a written proposal that retained their demand for a 14-percent wage cut for the first year of a contract. The only difference here was that the Employers proposed a wage increase in the third year of a contract equal to one third of the CPI whereas, the previous proposal was for this level of wage increase in the fourth year of a contract. Additionally, the written proposal, among other things, proposed to eliminate the wage accruals and the Easter adjustment. It also proposed to retain the most favored nation's clause to delete its sunset provision. At some point, Pollack turned over a cost sheet, purporting to show how much it cost the employers to perform the DOE routes. Pollack's testimony and notes show that Cordiello said that he would never agree to a most favored nation's clause whereupon Neil Strahl said that the employers would never agree to a contract without it. Cordiello said that the reason he could not agree to such a clause is because it would not allow the Union to have flexibility in negotiations with employers who did business outside the DOE area. It was his position that unless he could get, for example, a newly organized shop to agree to all of the economic terms that are in the Respondents' agreements, he would have to walk away from that shop because any economic concessions granted to that employer would have to automatically be given to the Respondents and their 8800 employees. Cordiello stated that although his union had contracts with companies covering prekindergarten routes (that apparently had lower labor costs), those contracts were limited to pre-k routes. (And therefore presumably would not be applicable to DOE kindergarten to 12 routes).[15] Dominick Gatto told Cordiello that he should get his people to organize shops and Cordiello said that organizing was very difficult. Pollack stated that the employers needed a most favored nation's clause so that there is a "level playing field." Cordiello responded by stating that Pollack could beat it to death, but he was not going to change his mind.

On March 12, the parties met again. The Union made a number of modified proposals among which were; wage increases of 3 percent each year; a 1-month moratorium on health plan contributions; and a freeze on pension fund contributions for 1 year. Cordiello offered a suggestion that the expired contract be extended for 18 months for those employers having

[15] By the terms of the expired contract, the most favored nation's clause would not be triggered by any agreement that Local 1181 made with a contractor doing only pre-k work.

DOE contracts expiring in 2014, and that it be extended for 30 months for those employers whose DOE contracts were set to expire in June 2015. As to specific proposals, Cordiello refused to eliminate wage accruals and refused to eliminate the adjustment weeks. The Union's counsel, Gilberg, asserted that the Cordiello's offer to extend the contracts was made with an offer to extend the most favored nation's clause as well. This was denied by Pollack and Cordiello's testimony was that he only made such an explicit offer to extend the most favored nation's clause at a negotiation session back in 2012. More likely is that Cordiello offered to extend the expired contracts and did not explicitly offer to extend the most favored nation's clause along with it. This is important inasmuch as extending the expired contract would not, by itself, extend the most favored nation's clause because under the terms of that contract, that provision was set to expire on December 31, 2012.

At the March 12 meeting, the employers revised their wage demand; now asking for a 10-percent cut for drivers and a 5-percent cut for matrons; a freeze for the second year; and a small increase in the third. According to Pollack and his notes, Cordiello again rejected the most favored nation's clause and Attorney Millman asked if the Union was willing "to go backwards on wages." Cordiello responded that this was not something the Union would look to do, but that they needed to look at everything. To that, Carter Pate said that Reliant was going to lose over $300,000 this week, "while you keep looking." Gatto complained that his companies were hemorrhaging money.

General Counsel's Exhibit 19 is a document sent by Pollack to Cordiello, setting forth a recap of where the negotiations stood as of March 13. Cordiello testified that this document was accurate. The document states that there was no agreement on the most favored nation's clause and it also set forth other areas where the parties were in disagreement. It also set forth those areas where the parties had made tentative agreements, but these mainly related to noneconomic issues. Among other things, the document shows that there was no agreement on continuing the wage accruals or the adjustment weeks. Also, there was no agreement on overtime, with the employers seeking to limit overtime and the Union trying to retain as much overtime on a daily instead of on a weekly basis.

After the March 12 meeting, it doesn't strike me that the parties were close to reaching an agreement because the differences on material economic issues were really major and the parties were far apart on those issues. Nevertheless, I note that in the context of this case, the Respondents, in urging that I find an impasse, seem to be placing all of their eggs in the most favored nation's basket.

The final bargaining session took place on March 19, 2013. Based on the credited testimony and based on the bargaining notes, I make the following findings of fact relating to this meeting. The meeting opened with Cordiello giving a speech about fairness and how working people needed to be protected. After that, the parties ran down the Union's demands wherein their wage proposal was reduced to calling for an increase of 2 percent per year for the first 2 years and a 3-percent increase for the third year. Cordiello stated that the Union could still move on wages. Cordiello withdrew the Union's successorship clause proposal and stated that the Union would agree to have a contract reopener coupled with a 3-year contract, but only if the most favored nation's clause was removed. After some more discussion, the parties separately caucused from about 12:10 to 12:35 p.m..

After the caucus, Pollack handed over a document that was entitled "Last Best Offer." According to Cordiello and his notes, he stated that the Union did not believe that they were at an impasse and that there was still a lot left to negotiate. He told the Respondents that the Union was willing to continue to negotiate either with the group or with each employer separately. He complained that all of the audits had not yet been completed and that mediation was still available. Cordiello asked if there was anyone at the table who was willing to continue to negotiate. He stated that if they believed that they were at an impasse, he was going to instruct his attorneys to file unfair labor practice charges.

The Respondents' version of this meeting is not that much different. In their version, Pollack after the first caucus, tendered the last best offer and the Union went out to review it. His testimony was that after they returned, there was a discussion of the most favored nation's clause and Cordiello said that he absolutely would not agree to any contract containing such a clause. Pollack's notes have Gatto saying that it was not fair to give other companies a better deal and that the Union "was going to enable the other guys to take me out of business." According to Pollack's notes, Cordiello stated that he didn't cut any deals with people and that other unions might make sweetheart contracts with companies. According to the Respondents, Pete Rossi of RPM Systems said that "unless you agree to the most favored nation's clause we can't move" and that it made no sense to keep on talking.

Sometime after 12:30 p.m., Pollack stated that the Employers were declaring an impasse. According to Pollack's notes, Cordiello stated that he didn't think that there was an impasse, especially because there was only one specific item that the Employers were asserting as being the basis for the impasse. Pollack's notes also show that Cordiello asked for mediation. (This was refused.) Before the meeting ended at 2:55 p.m., Pollack notified the Union that the final offer would be implemented on Friday.

There is, in fact, no dispute about the fact that after March 19, 2013, the Respondents did implement the final offer which among other things meant that the Easter adjustment and the summer accruals were not paid to the employees. This meant that drivers lost in the neighborhood of about $10,000 each and the matrons lost about $5000 each.

By letter dated March 20, Pioneer advised its employees regarding the state of negotiations and told them, inter alia:

> More than 65 companies submitted bids for the new work. Nearly half . . . are new to our industry and submitted bids which were so low that it is clear they intend to pay minimal non-union rates. . . . Unfortunately our cost structure under the current Local 1181 contract makes it impossible to submit a competitive bid. We will not sit by and lose our business while competing contractors bid for our work, paying drivers

> and escorts substandard lower wages and benefits. We need to lower our overall costs in order to survive.
>
> The Union or fellow employees may ask you to strike or engage in some other job action. . . . Any direct or indirect acts which either sabotage or disrupt the safe and efficient Pioneer School bus operations will subject you to severe disciplinary action up to and including termination . . . and possible criminal charges. Further, should any employee commit any of the illegal acts or misconduct it will disqualify said employee from any potential retirement or severance buy out from Pioneer. These acts include but are not limited to illegal sick outs, illegal job actions, vandalism and other related illegal acts which harm Pioneer. If you have any questions about your rights you can call the NLRB. . . .
>
> Six months of bargaining have left us at an "impasse" (also known as a "Dead lock"). . . . As a result, Local 1181 contractors submitted their "final and Best" proposals, (attached hereto). . . . Those terms and changes will now be implemented as is our right under the law. The revised wages and benefits are the bare minimum that we need in order to retain the work we have and enable us to attempt to successfully compete for future work. We truly hope that there will be light at the end of the tunnel to provide economic increases in future union negotiations.
>
> I believe it will be smart and in the best interest of all parties to continue to work together during this uncertain critical 27 month period (through 6/31/15) until we see the actual final results of the DOE bids with or without the EPP.
>
> Please understand that you and the Company are in this together. Without the EPP, you no longer have the right to "follow the work" to another company. [T]hat means if we lose our work, you will lose your jobs. . . .

The General Counsel alleges that the second paragraph of this letter, contains an illegal threat of reprisal and is violative of Section 8(a)(1) of the Act. (I will deal with that later.) I note that although the letter attaches the final offer which includes the most favored nation's clause, it contains no mention of that provision and contains no explanation as to why the company thinks that it is so important. On the contrary, this letter, which was approved by labor counsel, emphasizes the need for immediate cost savings. It contains no discussion of why Pioneer or any of the other respondents believed that having this particular most favored nation's clause in a contract with Local 1181 would protect them from winning bids for DOE contracts made by companies having contracts with other unions, or with no union at all. (Because the clause would apply only to companies having contracts with Local 1181 and not to any others, it could not trigger a reduction in labor costs if, for example, a nonunion company successfully bid for a DOE contract.) Moreover, there is no assertion in this letter that this employer had any reason to suspect or believe that any of the successful February 2013 bidders had made a separate deal with Local 1181 that allowed lower labor costs.

Analysis

The first thing that is unusual about this case is that the interest of the companies that had pre-2012 contracts with the city's Board of Education was the same as the unions that represented their employees. This included the Respondents in this case and Local 1181, both of which had the identical interest in keeping this business within the relatively small group of companies that had performed the work, without outside competition, since 1979.[16] The Union and the Respondents were not so much adversaries to each other as they both were adversaries against the mayor of New York. It is in the interest of the respondent employers, their employees, *and* the Union representing these employees, to prevent, if they can, outside contractors from coming in with lower labor costs and being able to under bid for this work. Contrary wise, it is in the interest of outside contractors and any employees they may employ, to be able to effectively compete against the previously protected companies. What is in the general public's interest is not for me to say. This is not an appropriate forum to debate or decide that issue.

The Respondents assert that the Union was engaged in stalling tactics which unduly delayed the negotiations. But even if this assertion is correct, this does not necessary mean that the parties had reached an impasse. In this regard, controlling the tempo of negotiations is, in my opinion, an integral part of the bargaining process.

Bargaining for a collective-bargaining agreement that is intended to last for several years and which will govern multiple facets of an employment relationship, is not the same as buying a car from an auto dealer. For one thing, in an effort to reach a contract, the parties may leave certain issues unsettled or ambiguous; allowing for negotiations during the life of the agreement or to be resolved if necessary through midcontract arbitration. For another thing, because an employer is under no legal obligation to provide a union with its financial information, unless it pleads an inability to pay,[17] most negotiations take place where there is an information deficit on one side of the table.

The role of time in negotiations cannot be underestimated and he who can control or manipulate the timing of negotiations can obtain a significant advantage. For example, in first contract negotiations after a union has recently been certified following an election, it may be to the employer's advantage to delay negotiations in the expectation that its employees may be reluctant to strike and that the union will lose its leverage over time. And during that period of delay, the employer will retain its existing wage and benefits costs. In this scenario, so long as an employer does not unduly delay negotiations, the fact that it can legally agree to meet on fewer dates over a longer period of time, provides it with substantial bargaining leverage.

On the other hand, where an employer is seeking cut backs which are, at least to some extent, economically necessary, or where a union perceives that an employer is not bluffing and is

[16] As noted above, although there were 28 named respondents, many of those companies were commonly owned by a smaller group of people such as Dominick Gatto, Ray Fouche, and others.

[17] See *NLRB v. Truitt,* 351 U.S. 149 (1956).

willing to suffer a strike in order to obtain cutbacks, it would be in the union's interest to stretch out bargaining for as long as possible. In that scenario, because the employer is legally bound to continue the existing wages and terms of employment contained in an expired contract, it is to the union's advantage to retain those wages and benefits by bargaining slowly while avoiding an impasse. Under this kind of scenario, the union's interest would be to meet on fewer occasions and to grudgingly make small concessions in an effort to extend the bargaining process while avoiding an impasse. Just like the first scenario where it is in the interest of an employer to slow down the bargaining process, this second scenario depends on the union meeting the statutory legal obligation to meet at reasonable times and places and to bargain in good faith.[18] But as these terms allow for a good deal of leeway, both unions and employers are, within the limit of "reasonableness," within their legal rights to try to control the tempo of negotiations to their own advantage.

The Respondents contend that the parties reached an impasse on March 19, 2013. In making this assertion they acknowledge that the alleged impasse was over a single item that being the most favored nation's clause. They assert that because this issue was so important to them, a stalemate on this one issue was sufficient to cause an impasse in negotiations. I do not agree.

In *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), the Board defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." In that case, the Board had found that the parties had not reached an impasse but the court disagreed.

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board enumerated some of the factors it takes into account in determining if the parties have reached impasse. It stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.[19]

Because we are dealing with the process of bargaining which is, by definition, somewhat fluid, there can be reasonable difference of opinion as to when an impasse is reached.[20] But I note that in these kinds of cases, the Board has held that where a party declares an impasse, the burden of proof rests with the party claiming the impasse. *L.W.D., Inc.*, 342 NLRB 965, (2004); *CalMat Co*., 331 NLRB 1084, 1097–1098 (2000), *CJC Holdings, Inc*., 320 NLRB 1041 (1996).

Although it is possible for an impasse to come into existence over a single issue,[21] I note that where one of the parties asserts that a single issue is the cause of an impasse, the burden is far greater than normal. In *CalMat Co*., supra, the Board stated that in such a case, the party asserting a single issue impasse must establish:

> [F]irst the actual existence of a good faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

In the present case, I don't think that there can be much doubt that the parties were far apart on whether they were going to reach an agreement to retain the expired contract's most favored nation's clause. The real question as far as I am concerned is whether this was genuinely a matter of crucial importance as claimed by the Respondents. As they put it, the retention of this clause was, in the existing circumstances, necessary for their continued economic viability. They assert that without the retention of the most favored nation's clause, the Respondents would not be able to make competitive bids for city schoolbus routes as those routes were being put out for bid in 2013 and 2014. In this regard, they point to the fact that under the existing labor conditions as set forth in the previous collective-bargaining agreement, those Respondents whose

[18] Sec. 8(d) provides in pertinent part; "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

[19] Of course a legitimate impasse can only result from good-faith bargaining over mandatory subjects of bargaining. See for example *Gloversville Embossing,* 314 NLRB 1258 (2000).

[20] In recent years there have been a number of cases where the D.C. Circuit Court of Appeals has differed with the Board on the issue of impasse. For example, the court refused to enforce the Board's findings in the following cases. *Laurel Bay Health & Rehab. Ctr. v. NLRB* (D.C. Cir. 1/20/12); *Comau Inc. v. NLRB* (D.C. Cir. decided 3/2/12); *Erie Brush & Mfg. Corp. v. NLRB* (D.C. Cir. decided 11/27/12). On the other hand, this same circuit upheld the Board's findings that no impasse had been reached in the following cases. *American Standard Co. v. NLRB* (D.C. Cir. Decided 2/17/12); *Monmouth Care Center v. NLRB* (D.C. Cir. decided 3/9/12); *Atrium of Princeton v. NLRB* (D.C. Cir. 6/29/12).

[21] See for example *Redburn Tire Co.,* 358 NLRB No. 109 (2012), where the Board held that an impasse was reached when the parties could not come to an agreement on medical insurance, that being the critical issue in the negotiations. The Board emphasized that the union, while failing to put forth any counteroffers, insisted that there would be no agreement unless the employer changed its final offer. The Board held that the employer acted lawfully when it threatened to and then unilaterally implemented its final offer, permanently replaced economic strikers, and posted signs announcing the number of striker-replacement applications that it had received. See also *Clarke Mfg., Inc.*, 352 NLRB 141 (2008), where the Board held that an impasse had been reached because the parties "were simply unable to resolve health care issue and any agreements on other issues would not have resolved the impasse."

Board of Education contracts expired in June 2013, lost almost every bid for the routes that they had historically performed.

But does one follow from the other? Would the retention of the most favored nation's clause help the Respondents to be able to make competitive bids?

The most favored nation's clause in the prior contract would have allowed the Respondents to unilaterally modify their own labor agreements upon proof that Local 1181 had executed a contract with any other company providing New York City schoolbus services where that agreement "provided economic terms regarding wages, health insurance coverage, pension, wage accruals, or the 10 hour daily spread" more favorable than those contained in the Respondents' contracts.

However, it did not allow the Respondents to reduce their contractual labor costs if Local 1181 executed a contract with a company providing schoolbus services for prekindergarten students or if it executed a contract with a company providing schoolbus services outside the city of New York. (For example, in Long Island.) Indeed, as to the later example, a collective-bargaining agreement between Local 1181 and a Long Island company was introduced into evidence and it explicitly stated that the wage and benefit terms of the contract could not be applied in the event that the company, at a future date, performed school bus services in New York City.

Moreover, the most favored nation's clause could not have triggered a reduction in the Respondents' contractual labor costs in the event that other companies successfully bid for the New York City contracts and either had no union or had different unions representing their employees. And since the opening of the bidding process for the first time since 1979 attracted individuals or enterprises that owned schoolbuses, their success in obtaining bids, based on lower labor costs, could not have triggered modifications in the Local 1181 labor agreements. That is, there is no way that the retention of the most favored nation's clause in the next contract could have protected the Respondents from low cost competitors who made bids and who did not have collective-bargaining agreements with Local 1181.

During the entire time that most favored nation's clause was in existence from 2009 to 2012, it was never triggered once. And if it were to be retained in a new contract, there are as far as I can see, only two very improbable ways that it could be triggered to the benefit of the Respondents. First would be if a new company successfully bid for DOE routes and entered into a collective-bargaining agreement *only with Local 1181*, whereby its employees would be paid at wage rates and benefit levels that would be lower than those contained in any new agreement between Local 1181 and the Respondents. The second and even more improbable way that the most favored nation's clause could be triggered would be if one or more of the current Respondents defected from the group and the Union consented to make contracts with them that lowered their labor costs vis-a-vis the nondefecting Respondents.

In my opinion, the whole concept of what it would take to trigger the most favored nation's clause is completely speculative and is based on the unlikely event that Local 1181 would possibly consent to enter into a contract or contracts covering a relatively few number of employees that would automatically trigger a reduction in pay and/or benefits in agreements covering over 6000 employees. I therefore believe the testimony that certain of the Respondents' principals told union representatives that the most favored nation's clause was not really that significant to them; that what they really wanted and needed in order to compete with the new comers, were substantial cutbacks in wages and benefits. To me, this makes a lot more sense and is, in my opinion, an example of comparing a single bird in the hand to the speculative benefit of having two birds in the bush.

In my opinion, the Respondents' rationale for retaining the most favored nation's clause would not have addressed the issue that they assert they were worried about. And based on this conclusion, I find that the most favored nation's clause was not, from the Respondents' point of view, the crucial bargaining issue that they claimed was necessary in order for them to agree to a new contract. Since I find that there was no impasse in bargaining, I also conclude that the Respondents violated Section 8(a)(5) and (1) by unilaterally putting into effect their final offer made on March 19, 2013.

The General Counsel also alleges that Pioneer violated Section 8(a)(1) of the Act by threatening its employees with reprisals if they engaged in union and/or protected concerted activity. This allegation is based on a written memorandum sent to Pioneer's employees on March 20, 2013. In that memorandum, the employer stated that severe consequences including termination would follow from certain types of activity. For the most part, the memorandum lists types of activity, such as vandalism, sabotage, etc., that would, in fact, justify disciplinary action. However, the memorandum goes on to state that acts warranting discipline would include but would not be limited to illegal sick outs, illegal job actions, and other related illegal acts which harm the employer. As this last description is too vague, it could tend to lead employees to conclude that certain types of concerted actions which are in fact protected by the Act, could lead to discipline. In this regard, the General Counsel cites *MCI Mining Corp.*, 283 NLRB 698, 704 (1987), and in my opinion that case supports the proposition that the quoted portion of the leaflet violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By prematurely declaring an impasse on March 19, 2013, and by implementing their final offer, the Respondents violated Section 8(a)(5) and (1) of the Act.

2. By threatening employees with reprisals if they engaged in union or protected concerted activity, Pioneer Transportation Corp. violated Section 8(a)(1) of the Act.

3. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the Union's request, the Respondents are required to resume bargaining with Local 1181.

Upon the Union's request, the Respondents shall be required to retroactively rescind all of the unilateral changes made after March 19, 2013, and make their employees whole for all monetary losses that they have incurred as a result of the unlawful unilateral changes, as set forth in *Ogle Protective Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with the interest rate as computed in *New Horizons,* 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enfd. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011).[22]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

A. The Respondents, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Prematurely declaring an impasse in bargaining.

(b) Unilaterally changing employee wages, hours, and other terms and conditions of employment in the absence of a valid impasse in bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, resume bargaining with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document with the Union.

(b) Rescind all changes made to the terms and conditions of employment made after March 19, 2013.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at their places of business in New York, copies of the attached notice marked "Appendix A."[24] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

B. The Respondent Pioneer, shall

1. Cease and desist from

(a) Prematurely declaring an impasse in bargaining.

(b) Unilaterally changing employee wages, hours, and other terms conditions of employment in the absence of a valid impasse in bargaining.

(c) Threatening employees with reprisals if they engage in union or protected concerted activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, resume bargaining with the Union as the exclusive representative of its employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document with the Union.

(b) Rescind all changes made to the terms and conditions of employment made after March 19, 2013.

(c) Make employees whole, with interest, for the loss of any earnings or benefits resulting as a result of any changes in the terms and conditions of employment made after March 10, 2013.

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[22] I recognize that requiring the Respondents to restore the wages and terms and conditions that existed prior to March 19, 2012, may, in the absence of a change of policy by the city, result in the Respondents being uncompetitive in their ability to bid for schoolbus routes. I also recognize that restoring those wages and terms of employment may also result in some of the Respondents losing all or most of their business when their existing Department of Education contracts expire, thereby resulting in the layoff of many of Local 1181's members. But I do not function as a bankruptcy judge who has the authority to modify the terms of a collective-bargaining agreement upon good cause shown. In ordering the Respondents to bargain and to restore the status quo ante, I can only hope that each side will have sufficient information and wisdom to compromise and resolve these matters to their mutual interest.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, copies of the attached notice marked "Appendix B."[25] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 19, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 20, 2013

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize.
To form, join, or assist any union.
To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection.
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prematurely declare an impasse in bargaining.

WE WILL NOT unilaterally change employee wages, hours, and other terms and conditions of employment in the absence of a valid impasse in bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees with respect to their Section 7 rights.

WE WILL upon request, resume bargaining with the Union as the exclusive representative of our employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document with the Union.

WE WILL rescind all changes made to the terms and conditions of employment made after March 19, 2013.

WE WILL make our employees whole, with interest, for the loss of any earnings or benefits resulting as a result of any changes in the terms and conditions of employment made after March 10, 2013.

ALL AMERICAN SCHOOL BUS CORP., ANJ SERVICE, INC., ATLANTIC QUEENS BUS CORP., BOBBY'S BUS CO. INC., BORO TRANSIT, INC., B-ALERT INC., ATLANTIC ESCORTS INC., CITY WIDE TRANSIT, INC., CANAL ESCORTS, INC., CIFRA ESCORTS, INC., EMPIRE STATE ESCORTS, INC., GOTHAM BUS CO. INC., GRANDPA'S BUS CO., INC., HOYT TRANSPORTATION CORP., IC ESCORTS, INC., KINGS MATRON CORP., LOGAN TRANSPORTATION SYSTEMS, INC., LONERO TRANSIT INC., LORISSA BUS SERVICE INC., MOUNTAINSIDE TRANSPORTATION CO., INC., RAINBOW TRANSIT INC., AMBOY BUS CO., INC., RELIANT TRANSPORTATION, INC., RPM SYSTEMS INC., SCHOOL DAYS INC. AND TUFARO TRANSIT CO. INC.

APPENDIX B

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The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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To bargain collectively through representatives of their own choice.
To act together for other mutual aid or protection.
To choose not to engage in any of these protected concerted activities.

[25] See fn 24, supra.

WE WILL NOT prematurely declare an impasse in bargaining.

WE WILL NOT unilaterally change employee wages, hours, and other terms conditions of employment in the absence of a valid impasse in bargaining.

WE WILL NOT threaten our employees with reprisals for engaging in union or protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees with respect to their Section 7 rights.

WE WILL upon request, resume bargaining with the Union as the exclusive representative of our employees with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, embody such agreement in a signed document with the Union.

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